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Supreme Court, U.S.
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IN THE

Supreme Court of the United States of America

OCTOBER TERM, 1992

CENTRAL BANK OF TAMPA, f/u/b/o
R. W. MASHBURN, LAMAS ORIENTAL FOODS, INC.
AND LAMAS, INC.,

Petitioner,

-vs-

TRANSAMERICA INSURANCE GROUP,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

IS IT REVERSIBLE ERROR TO ADMIT FABRICATED EVIDENCE, THE TRUTH OF WHICH IS NOT VERIFIED BY SWORN TESTIMONY OF ANY WITNESS, TO ESTABLISH AN ESSENTIAL FACT IN ISSUE IN A JURY TRIAL?

THE COURT BELOW ANSWERED THIS QUESTION IN THE NEGATIVE, CONTRARY TO DECISIONS OF THE SECOND, THIRD, FIFTH, SIXTH AND EIGHTH CIRCUIT COURTS OF APPEALS.

II.

IS THE ADMISSION OF FABRICATED EVIDENCE, NOT VERIFIED BY THE SWORN TESTIMONY OF ANY WITNESS, AS THE SOLE EVIDENCE OFFERED TO ESTABLISH AN ESSENTIAL FACT IN ISSUE IN A JURY TRIAL A VIOLATION OF DUE PROCESS UNDER THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES?

THE COURT BELOW ANSWERED THIS QUESTION IN THE NEGATIVE, DENYING PETITIONER'S RIGHT TO DUE PROCESS IN ITS ACTION TO RECOVER FOR THE BENEFIT OF USE PETITIONERS ON A POLICY OF INSURANCE FOR A FIRE LOSS.

List of All Parties to the Proceeding.

There are no parties to the proceeding in the court below not named in the foregoing caption unless subsidiaries of the Respondent are involved. To Petitioner's knowledge, any such subsidiaries would be wholly owned by the Respondent.

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Official and Unofficial Reports of Opinions Delivered in the Case.

To Petitioner's knowledge, there is no official report of the decision or opinion of the court below, which bears the inscription of the court "DO NOT PUBLISH" and cannot be found in the federal reporter system. There is no official report of the judgment entered in the United States District Court, Middle District of Florida, Tampa Division. The Opinion, Judgment and Order denying rehearing of the court below are set out in the Appendix.

Statement of the Grounds for this Court's Jurisdiction.

(1) The court below entered Judgment on April 3, 1992.

(2) Petition for Rehearing was timely filed and was denied by the court below by Order entered on June 3, 1992. The judgment of the court below was issued as its mandate on July 22, 1992.

(3) No cross-petition.

(4) The statutory provision vesting jurisdiction in this Court is Title 28, U.S.C. § 1254 (1).

Rule of This Court Involved.

The proceeding involves a construction of Rule 803 (5), of the Federal Rules of Evidence, adopted by this Court, reading as follows:

> (5) Recorded recollection. A memorandum of record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

IN THE

Supreme Court of the United States of America

CENTRAL BANK OF TAMPA, f/u/b/o
R. W. MASHBURN, LAMAS ORIENTAL FOODS, INC.
AND LAMAS, INC.,

Petitioner,

-vs-

TRANSAMERICA INSURANCE GROUP,

Respondent.

—

PETITION FOR WRIT OF CERTIORARI

TO: United States Court of Appeals
Eleventh Circuit

NOW COMES CENTRAL BANK OF TAMPA, f/u/b/o R. W. MASHBURN, LAMAS ORIENTAL FOODS, INC. and LAMAS, INC., by its attorney undersigned, and files its Petition for Writ of Certiorari to be issued to the United States Court of Appeals, Eleventh Circuit, in the above-entitled cause, pursuant to Title 28, U.S.C. § 1254 (1) and Rule 14 of the Rules of the Supreme Court of the United States.

Statement of the Case.

The issue involved in this action is whether or not the Petitioner, Central Bank of Tampa, as mortgagee, *received* [1] a Notice of Cancellation of an insurance policy issued by the Respondent covering premises destroyed by fire, prior to the destruction thereof. Approximately four months after the Petitioner brought an action against Respondent for the fire loss, an unknown representative of the Respondent prepared an Affidavit in which it was certified that the Notice of Cancellation or Non Renewal of the Respondent had been mailed to four different parties at four different addresses in the States of Georgia and Florida on June 3, 1986. This Affidavit was presented by the same or another unknown party to a former policy clerk of Respondent, who had been engaged in another employment for a period of approximately one year, and obtained her signature to the Affidavit approximately fifteen and one-half months after the notices were allegedly mailed. The Affidavit was produced as an exhibit at the trial, and the only testimony with regard thereto was that of the affiant, who did not remember anything about the alleged mailing of notices or anything about the presentation to her or signing the Affidavit, but could only identify her signature and that of a fellow employee thereto. There was no testimony elicited regarding the preparation of the Affidavit or the source of the information contained therein.

A copy of the Notice of Cancellation or Non Renewal (Appendix A-28) received as an exhibit at the trial was also signed by the affiant but was not the source of the facts set out in the Affidavit. The addresses of only two of the four parties named in the Affidavit appeared on the Notice of Cancellation or Non Renewal, and in the space provided for the "ADDRESS" of the Petitioner, the Notice read "AFCO #25266-7", the abbreviation for the name of the premium finance company that financed the

[1] The District Court had previously held that the policy required that the notice be *received* by Petitioner, not merely mailed to Petitioner's correct address.

loan for the insured and the loan number. There was no evidence produced by Respondent regarding the source of the correct address of the Petitioner as set out in the Affidavit, or of the circumstances under which the same was presented to the affiant, or of any statement made to her, or by her, at that time regarding the contents of the Affidavit or her recollection of the event recorded. The Affidavit was read to the jury over Petitioner's objection, and was the only evidence that a Notice of Cancellation was ever *sent* to Petitioner. All six of the employees of Petitioner who would have obtained from the Post Office Box, opened and processed the notice, if it had been actually received by Petitioner, testified at the trial that no Notice of Cancellation of any kind was *received* by Petitioner from any source before the fire.

It is obvious and not denied by the witness that the Affidavit was fabricated evidence [2], prepared by Respondent to provide a defense to the action, which was instituted approximately four months prior to the date of the Affidavit, by creating an exhibit incorporating the correct address of the Petitioner. It was apparently realized by Respondent at that time that the Notice of Cancellation or Non Renewal set out an incorrect "address" for the Petitioner, and that no inference or presumption that Petitioner received the Notice would arise unless it appeared from some source that the same had been sent to the Petitioner's correct address. There was no evidence offered by Respondent of any facts or circumstances attending the preparation of the Affidavit

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[2] "FABRICATED EVIDENCE. Evidence manufactured or arranged after the fact, and either wholly false or else warped and discolored by artifice and contrivance with a deceitful intent."

"FABRICATE. To invent; to devise falsely. Invent is sometimes used in a bad sense, but fabricate never in any other.

* * *

To fabricate evidence is to arrange or manufacture circumstances or *indicia*, after the fact committed, with the purpose of using them as evidence, and of deceitfully making them appear as if accidental or undesigned; to devise falsely or contrive by artifice with the intention to deceive. Such evidence may be wholly forged and artificial, or it may consist in so warping and distorting real facts as to create an erroneous impression in the minds of those who observe them and then presenting such impression as true and genuine."
Black's Law Dictionary, Revised Fourth Edition.

or the source of the factual matter stated therein, including whether or not the correct address of the Petitioner was in the file available to the affiant at the time the Notices were allegedly mailed, or if it was customary to mail Notices to lienholders through the premium finance company as the Notice indicated that the affiant had done. There was no evidence that mailing of the Notice to Petitioner was "required" within the meaning of the certificate thereon reading that affiant mailed "a notice of cancellation or non renewal to the insured and, if required, to the lienholder". The affiant had no memory of all such matters, and denied that she had a present recollection that she knew the facts in the Affidavit to be true when she signed it (Appendix A-20).

Basis for Federal Jurisdiction.

The action was filed in the Circuit Court for Hillsborough County, Florida, and was removed by Respondent to the Federal Court, pursuant to Title 28, U.S.C. §§ 1332 and 1441 as a diversity case.

Argument.

It is the contention of Petitioner that there are three grounds for granting Petition for Writ of Certiorari and reversing the judgment of the Eleventh Circuit Court of Appeals. These grounds are adopted from Rule 10 of the Rules of the Supreme Court of the United States, as follows:

(1) The Court of Appeals has rendered a decision construing Rule 803 (5) of the Rules of Evidence, adopted by this Court, in conflict with decisions of other Courts of Appeals on the same matter.

(2) The Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such departure by a lower court, as to call for the exercise of this Court's power of supervision.

(3) The Court of Appeals has decided an important question of federal law arising under the Fifth Amendment to the Constitution of the United States, involving the construction of a Rule of Evidence adopted by this Court, that has not been, but should be, settled by this Court.

(1) **Conflict Jurisdiction.**

It can be said with certainty that no other Circuit Court of Appeals has ever construed Rule 803 (5) of the Federal Rules of Evidence to permit the admission of fabricated evidence of the kind read to the jury in this action. Rule 803 (5) expressly requires that the party offering the contents of the writing must produce evidence from which it is "shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly". This language can only mean that the affiant, Judy Garrabrant, must have had all of the facts set out in the Affidavit fresh in her memory fifteen and one-half months after the alleged mailing of the Notices by her as a routine duty in another employment, which she had left a year earlier, and that the Affidavit was merely a statement of her personal knowledge at the time she signed it. The factual portion of the Affidavit which she is supposed to have retained in her memory and, therefore, to have personal knowledge of fifteen and one-half months after the event, reads as follows:

> "On June 3, 1986, I mailed a copy of the Notice of Cancellation or Non Renewal attached hereto to: one, Teresa Oriental Foods, Incorporated, doing business as Lamas Restaurant and Pasquale Matassini, at 3699 Gandy Boulevard, Tampa, Florida 33611; two, Central Bank of Tampa, Post Office Box 4115, Tampa, Florida 33677; three, AFCO Credit Corporation, 2990 Brandywine Road, Suite 100, Atlanta, Georgia 30341; and four, American Insurance Center, Post Office Box 271290, Tampa, Florida 33688.
>
> All were mailed U.S. regular mail except to Teresa Oriental Foods, Incorporated, doing business as Lamas Restaurant and Pasquale Matassini, which was mailed certified mail.

> Each of the four Notices of Cancellation or Non Renewal were mailed with the proper postage. All envelopes had the return address of Transamerica Insurance Company as well as the policy number listed, and I would have received back all undeliverable notices. I did not receive back any of the notices sent, including the notice sent to Central Bank of Tampa." (Appendix A-27)

Unless affiant could and did, at the time she signed the Affidavit, verify from her own memory as her personal knowledge, the accuracy of each fact asserted, including each digit of each address, the Affidavit was fabricated evidence not admissible under Rule 803 (5) or any other rule of evidence. In most of the decisions construing Rule 803 (5), the record was made by the witness who testified or made a statement with regard to, and within a few hours or days after, the event; and precisely because such details are not retained in the memory, the record is deemed to have more "guarantees of truthfulness" than the faulty memory of the witness. In this case, the witness admittedly had nothing to do with the preparation of the record and the only evidence that it was "adopted" by the witness is her signature on the Affidavit. It is inconceivable that the details of the exact post office box numbers and zip codes of four entities (and particularly the Petitioner who was allegedly receiving a Notice from Respondent for the first and last time) would remain in her memory for fifteen seconds after they were allegedly written on an envelope. To suggest that they were "fresh in the witness' memory" and that they "reflect that knowledge" fifteen and one-half months later is an insult to the intelligence, and simply emphasizes the fabricated nature of the Affidavit.

Decisions of other Circuit Courts of Appeals on similar facts uniformly exclude such evidence, even when the facts were stated or recorded by the witness at an earlier date, unless it is manifest that they were fresh in the memory of the witness at the time the record was made.

In the case of *Dickinson Supply, Incorporated* v. *Montana-Dakota Utilities Co.*, 423 F.2d 106 (8th Cir. 1970), the plaintiff

confronted a witness named Kudrna with a statement allegedly given by him to the State Fire Marshall and bearing his signature. When the witness denied having any recollection of the facts asserted in the statement, the same was offered in evidence as past recollection recorded and for impeachment. The Court held that the fact that the witness signed the statement was not sufficient to satisfy the rule requiring proof that the facts were fresh in the witness' memory when he allegedly made the statement and that his knowledge at that time was correctly set out therein. The Court said:

> "It is incumbent upon plaintiff to prove, by the person taking the statement, that Kudrna actually made the remarks attributed to him. . . Here, this essential proof was wanting." 423 F.2d 109

In another decision of the Eighth Circuit Court of Appeals, *Goings* v. *United States,* 377 F.2d 753 (8th Cir. 1967), the Court reversed a conviction by reason of the admission into evidence of the contents of a statement previously given by a witness for the prosecution (an Indian by the name of Ghost Bear), even though the witness admitted that the facts read from the statement were true after they were read. The Court observed that this procedure would substitute prepared, ex parte statements for testimony under oath in the courtroom and that the statement should not have been received as evidence in the case.

The Fifth Circuit Court of Appeals rejected similar evidence in *O'Malley* v. *United States Fidelity and Guaranty Co.*, 776 F.2d 494 (5th Cir. 1985). In that case, the contents of a report prepared by an engineer was offered into evidence as the recorded recollection of the witness who was a fellow employee of the engineer who prepared the report, but who did not participate in its preparation. The Court stated that, "The witness laying the framework for evidence admitted under 803 (5) must show the report to be accurate." If the witness did not write the report, as here, he must testify that he examined it and found it to be accurate. The Court pointed out that, as in the case *sub judice,* the witness "testified that he did not even remember reading the report before it was issued".

In another decision of the Fifth Circuit Court of Appeals, *In re Corrugated Container Antitrust Litigation,* 756 F.2d 411 (5th Cir. 1985), one Connor was interviewed and his statements recorded by government attorneys on November 14, 1977, regarding alleged antitrust violations of his employer in 1975. In an action against the employer, an attempt was made to introduce the record of the 1977 interview into evidence under Rule 803 (5). The Court rejected the recording as evidence and the ruling was affirmed on appeal because there was no "specific testimony that the recording reflected the witness' knowledge correctly when the matter was fresh in his memory".

The Fifth Circuit Court of Appeals assigned the same grounds for rejecting a statement written at the scene of a crime by a police officer in *United States* v. *Judon,* 567 F.2d 1289 (5th Cir. 1978). The police officer had written the license number and description of a vehicle observed by him near the scene of a crime and it was established that the accused owned a vehicle matching the description and with the same license number as recorded by the officer. The Court pointed out that the advisory committee drafting Rule 803 (5) expressed a fear that the rule "would encourage the use of statements carefully prepared for purposes of litigation under the supervision of attorneys, investigators or claim adjusters", and excluded the record due to the failure of the police officer to testify specifically that the same reflected his knowledge correctly when the matter was fresh in his memory.

The Sixth Circuit Court of Appeals held to the same effect in the case of *Cathey* v. *Johns-Manville Sales Corporation,* 776 F.2d 1565 (6th Cir. 1985). In that case, the plaintiff brought an action for damages resulting from inhalation of asbestos on various construction jobs over a period of many years. After the institution of the action, at the urging of his attorney and his wife, he prepared a list of the asbestos products to which he had been exposed for a period of years and at the trial the contents of the list were offered in evidence under Rule 803 (5), and also tendered to the witness for his use in refreshing his recollection. The trial court rejected the offer into evidence of the contents of the list for any purpose, and this ruling was affirmed by the

Court of Appeals on the ground that the list was not "made or adopted by the witness when the matter was fresh in his memory". It was the opinion of the Sixth Circuit Court of Appeals that the plaintiff's memory of the various brand names at the time that he composed the list was not fresh due to the passage of time and that:

> "the admission of items pursuant to Rule 803 (5) is justified only because 'a contemporary, accurate record is inherently superior to a present recollection subject to the fallibility of human memory' ".

The court stated that the plaintiff's list was "not at all contemporary and testimony at trial cast substantial doubt upon its accuracy".

The Second Circuit Court of Appeals reversed an action for error of the trial court in admitting the contents of a physician's office record in evidence in the case of *Felice* v. *Long Island Railroad Company,* 426 F.2d 192 (2nd Cir. 1970). The physician testified from his record that he took a history from the plaintiff on the first visit to his office in which the plaintiff stated that while lifting a heavy object he "slipped on grease and twisted himself in an awkward position", thereby injuring his back. On cross examination, the physician admitted that this note was "either written by myself or taken as a history by my girl"; and on further examination, it appeared that the note was written in his office record by an employee and the physician could not recall what history he had actually been given by the plaintiff. The author of the note was not called as a witness, and the court held that there were insufficient guarantees of accuracy and a motion to strike the testimony should have been granted, even though the note was made contemporaneously with the physician's interview with and treatment of the plaintiff.

Likewise, in the case of *United States* v. *Schwartz,* 390 F.2d 1 (3rd Cir. 1968), the Third Circuit Court of Appeals held that it was error to admit the contents of a statement signed by a witness regarding the person responsible for certain fraudulent entries in the records of his employer. The evidence showed that

Exhibit G-62 was prepared by counsel for the witness and tendered to him for his signature the day before he was to be sentenced on his conviction for implication in the fraudulent practices. On the witness stand, the witness acknowledged his signature, but did not recall the facts set out in the exhibit. The court admitted portions of the exhibit, and the Court of Appeals reversed. In its opinion, the Court stated that, even though there were certain guarantees of truthfulness of the statement in that it was prepared by the attorney for the witness, and the witness stated that he would not have signed the statement if it had been false, "that any such guarantees were greatly outweighed" by the length of time that had expired between the events recorded and the preparation of the statement, and by the purpose of its preparation being to obtain a light sentence for the witness.

The foregoing decisions, requiring that any statement admitted in evidence be made or adopted by the witness at a time when the *facts recited therein were fresh in the memory of the witness and that the statement accurately reflect the witness' knowledge at that time,* require the rejection of the Affidavit in the case *sub judice.* It is conceded that the Affidavit was prepared by an unknown person on the basis of information obtained from unknown sources after the filing of the action, and for the purpose of aiding in the defense thereof, and was presented to the witness by an unknown person for execution. It is further conceded that the affiant did not give any information to the unidentified person who prepared the Affidavit, and that factual matter alleged therein was obtained from sources other than the witness and the Notice of Cancellation or Non Renewal she prepared. It is also conceded that the Affidavit was presented to her for signature by the same or another unidentified person who was not called as a witness to testify to what was said by the affiant, or was said to her to induce her to sign the Affidavit. The affiant did not testify that the fact of her mailing a Notice of Cancellation or Non Renewal to Central Bank of Tampa on June 3, 1986, was fresh in her memory in September, 1987, and that the Affidavit accurately reflects her own knowledge at that time of that fact, and of the correct address of the bank, including post office box number and zip code.

It must be conceded that it would be humanly impossible for a person to remember accurately such details about an out of state mailing address to which the person addressed an envelope during the usual course of that person's duties more than fifteen and one-half months earlier in another employment. Yet, it is those very details, the post office box number and the zip code of the bank, that the Defendant was required to prove in order even to give rise to a rebuttable presumption or inference that the Notice was *received* by the Bank.

A different case might be presented if the witness had demonstrated a phenomenal memory with computer bank dimensions. But her testimony established that she had a very poor memory for specific facts, including addresses. In the course of her cross examination, Petitioner's attorney read to her the address of the Petitioner as set out in the Affidavit as "Central Bank of Tampa, Post Office Box 4115, Tampa, Florida 33677", and asked her if she had any personal recollection of having mailed the Notice to that address "at this time" (Appendix A-20). At that point, Respondent's attorney interrupted to concede that she did not have such a recollection at that time, and the following questions and answers ensued:

> "Q DO YOU HAVE A PRESENT RECOLLECTION THAT WHEN YOU SIGNED THIS PAPER, EVERYTHING IN IT YOU KNEW TO BE TRUE?
>
> A AT THAT TIME? YES, SIR.
>
> Q YOU HAVE A PRESENT RECOLLECTION?
>
> A OH, PRESENT? I'M SORRY. PRESENT RECOLLECTION, NO."
> (Appendix A-20).

Approximately ten minutes later, again on cross examination, the Notice was tendered to her and she was asked the following questions and gave the following answers:

> "WILL YOU TELL US, PLEASE, IF YOU DID MAIL A COPY OF THIS NOTICE OF CANCELLATION OR NON RENEWAL TO THE LIENHOLDER, CENTRAL BANK OF TAMPA, TO WHAT ADDRESS DID YOU MAIL IT?
>
> * * *
>
> IF I WAS JUST LOOKING AT THIS DOCUMENT, I WOULD NOT KNOW WHAT THE ADDRESS WAS.
>
> Q AND YOU DON'T KNOW AS YOU SIT THERE WHAT THE ADDRESS WAS?
>
> A NO, SIR.
>
> Q WOULDN'T YOU IN THE NORMAL COURSE, IF YOU HAD SENT SUCH A NOTICE TO CENTRAL BANK OF TAMPA AT ITS ADDRESS, HAVE PUT IN THE ADDRESS WHERE IT CALLS FOR THE ADDRESS OF CENTRAL BANK OF TAMPA?
>
> A I THINK THAT WAS THE NORMAL PROCEDURE AT THAT TIME."
> (Appendix A-25-26).

It is true that in response to a question by the trial judge regarding the "factual matters" contained in the Affidavit, the witness responded as follows:

> "THE COURT: AND YOU DON'T REMEMBER WHETHER YOU REMEMBERED IT AT THE TIME YOU SIGNED IT?
>
> THE WITNESS: I DON'T THINK I WOULD HAVE SIGNED IT IF I DIDN'T REMEMBER."
> (Appendix A-19).

But the witness' testimony that she did not "think" she would have signed the Affidavit if she didn't remember does not provide the specific testimony that she presently remembers that when she signed the Affidavit the exact address of the bank was fresh in her memory and that she then knew of her own unassisted recollection that she had mailed the Notice to that exact address, as required by Rule 803 (5). No other essential fact in a legal action could be regarded as established by the sort of conjecture displayed by the witness.

(2) **Departure from Usual Course of Proceedings.**

It is apparent from reading the testimony of Judy Garrabrant in its entirety that she had no recollection of any of the matters set out in the Affidavit or of the identity of the person who presented the Affidavit to her or of reading or signing the same. It is obvious from her testimony that she was attempting to carry out instructions given to her by Respondent's attorney prior to her taking the witness stand, but it is equally as obvious that she could not possibly testify at the trial to her knowledge concerning the factual matters stated in the Affidavit on September 18, 1987, when she had no memory of that day, including the circumstances under which she signed the Affidavit. One can't remember what one remembered on a day one can't remember.

As commented by the Fifth Circuit Court of Appeals in *United States* v. *Judon, supra,* the advisory committee who recommended adoption of Rule 803 (5) feared that the rule:

> "would encourage the use of statements carefully prepared for the purposes of litigation under the supervision of attorneys, investigators, or claim adjusters. Hence the example includes a requirement that the witness not have 'sufficient recollection to enable him to testify fully and accurately' " Title 28, *Federal Rules of Evidence,* Annotation on Rule 803, p. 279.

There can be no question that the fears expressed by the committee were fully realized by the preparation of the Affidavit

signed by Ms. Garrabrant, and without Rule 803 (5), she would not have been called as a witness because even if she had read the Affidavit many times before taking the witness stand, she could not have remembered all of the addresses set out therein; as demonstrated by her inability to remember the address of the Petitioner while testifying, even though it had been read to her a few minutes earlier. But the misconstruction of the Rule permitted this fabricated evidence to be received and to become the basis for denial of a recovery by Petitioner for the benefit of Use Petitioner, R. W. Mashburn, whose life savings were destroyed by the fire. There could be no more opportune time for this Court to exercise its power of supervision to prevent a travesty of the judicial process. If a party can tailor a document to meet the needs of a particular litigation and can get the fabrication into evidence without the oath of any witness by merely showing that some person once signed the document, fabrication of evidence will become common practice and conceivably the obligation of an attorney in preparing for a trial.

(3) **Deprivation of Due Process.**

The admission into evidence of the Affidavit resulted in deprivation of due process under the Fifth Amendment to the Constitution of the United States. This Court has held that the erroneous construction of a rule of court resulting in depriving a party of due process under the Fifth and Fourteenth Amendments constitutes a proper basis for the exercise of this Court's jurisdiction. In *Societe International* v. *Rogers,* 357 U.S. 197; 2 L.Ed.2d 1255; 78 S.Ct. 1087, the Court of Appeals of the District of Columbia had dismissed an action instituted by a Swiss national under Rule 37 (b), Federal Rules of Civil Procedure, for its failure to produce documents in response to the Court's Order. The plaintiff made a good faith effort to obtain the documents, but the Swiss government had confiscated the same because they were not discoverable under Swiss law. This Court reversed by a unanimous decision to prevent the loss of the plaintiff's right of action without due process.

In the case of *Schlagenhauf* v. *Holder,* 379 U.S. 104; 13 L.Ed.2d 152; 85 S.Ct. 234, passengers injured in a bus accident sued the bus driver and third party owners of the adverse vehicle for damages. The third party owners filed a crossclaim against the bus driver, and requested that he submit to a physical examination under Rule 35, Federal Rules of Civil Procedure, to support their claim that he was physically impaired. The Court of Appeals held that the rule did not apply to defendants making no claim for injury, and this Court reversed, holding that Rule 35 authorized physical examinations of a defendant when his physical condition was in controversy.

This Court has also taken jurisdiction by Petition for Writ of Certiorari in many cases in which due process had been denied through failure to observe the rights of those accused of a crime. In *Mallory* v. *United States,* 354 U.S. 449; 1 L.Ed.2d 1479; 77 S.Ct. 1356, this Court unanimously reversed the conviction of a nineteen year old man for the failure of police to take him before a commissioner "without unnecessary delay", in violation of Rule 5 (a) of the Federal Rules of Criminal Procedure. This Court held that this failure of the police to comply with the rule precluded the admissibility of the accused's confession. And in the case of *Thompson* v. *City of Louisville,* 362 U.S. 199; 4 L.Ed.2d 654; 80 S.Ct. 624, this Court reversed a conviction of the accused on charges of loitering and disorderly conduct for lack of any evidence to support the charges except the impressions and the opinions of the police officers making the arrest. Although the accused had been fined only ten dollars on each of the two charges, this Court said:

> "[A]lthough the fines here are small, the due process questions presented are substantial". 4 L.Ed.2d 658

This Court held that there was a lack of due process in the conviction of the accused in *White* v. *State of Maryland,* 373 U.S. 59; 10 L.Ed.2d 193; 83 S.Ct. 1050. The reversal was based upon the taking of a plea of guilty at a preliminary hearing before the accused had an opportunity to obtain counsel. This Court held that under these circumstances it was not necessary for the accused

to show prejudice resulting from denial of an opportunity to consult an attorney. *See also Hamilton* v. *State of Alabama,* 368 U.S. 52; 7 L.Ed.2d 114; 82 S.Ct. 157; *Cash* v. *Culver,* 358 U.S. 633; 3 L.Ed.2d 557; 79 S.Ct. 432; *Haynes* v. *State of Washington,* 373 U.S. 503, 10 L.Ed.2d 513, 83 S.Ct. 1336; *Carnley* v. *Cochran,* 369 U.S. 506, 8 L.Ed.2d 70, 82 S.Ct. 884.

In the case of *Rice* v. *Sioux City Cemetery,* 349 U.S. 70; 99 L.Ed. 897; 75 S.Ct. 614, this Court, after first affirming the decision of the Circuit Court of Appeals by an evenly divided Court, discussed the reasons for taking jurisdiction of cases presented by Petition for Writ of Certiorari. It was stated that jurisdiction would not be taken in cases of "[I]solated significance" (99 L.Ed. 902); and the majority opinion on rehearing directed a dismissal of the petition in that action because it appeared that the plaintiff was the only person affected by the decision due to the subsequent enactment of a statute by the legislature of Iowa that precluded the exclusionary policies of the cemetery that gave rise to the cause of action. There was a strong dissent by three members of the Court, who pointed out that justice denied to one litigant was a compelling basis for the Court's exercise of jurisdiction.

In the course of the majority opinion, this Court recognized that jurisdiction would be exercised where there were "[S]pecial and important reasons" (99 L.Ed. 901) for a decision by the Court. It is submitted that such special and important reasons exist in the action *sub judice* because a rule of evidence adopted by this Court has been misconstrued to deny justice to Use Petitioners, and the likelihood of repetition through fabrication of evidence in other cases is strong and foreseeable. The denial of due process to Use Petitioners justifies, and the probability of misuse of the rule in the future requires, this Court's acceptance of jurisdiction.

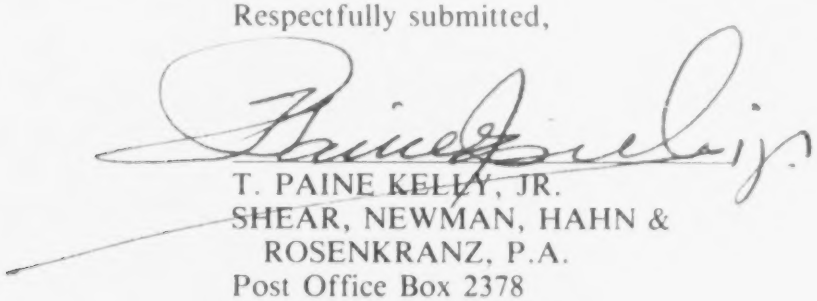
In *Rice,* this Court also wrote that "[R]eal and embarrassing conflict of opinion and authority between the circuit courts of appeal" (99 L.Ed. 904) [3] would require the Court to render a

---

[3] Citing *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 67 L.Ed. 712, 43 S.Ct. 422.

decision. It has been demonstrated in section (1) of the Argument in this Petition that five other Circuit Courts of Appeals have correctly construed the rule and that the Eleventh Circuit Court of Appeals, by its misconstruction, has given rise to "a real and embarrassing conflict of opinion and authority". Whenever such clear conflict exists in the construction of a rule adopted by this Court, the conflict "should be settled by this Court" (Rule 10 (c), Supreme Court Rules), in the exercise of its power of supervision over the federal court system.

Respectfully submitted,



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ATTORNEYS FOR PETITIONER

NO. _____

IN THE

Supreme Court of the United States of America

OCTOBER TERM, 1992

CENTRAL BANK OF TAMPA, f/u/b/o
R. W. MASHBURN, LAMAS ORIENTAL FOODS, INC.
AND LAMAS, INC.,

Petitioner,

-vs-

TRANSAMERICA INSURANCE GROUP,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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PERMANENT

Filed U.S. Court of Appeals
Eleventh Circuit
April 3, 1992
MIGUEL J. CORTEZ
CLERK

DO NOT PUBLISH

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

—

No. 91-3398

—

D. C. Docket No. 87-882-Civ-T-13C

CENTRAL BANK OF TAMPA,
Plaintiff-Appellant,

versus

TRANSAMERICA INSURANCE GROUP,
Defendant-Appellee.

—

No. 91-3418

—

Docket No. 87-882-Civ-T-13T

CENTRAL BANK OF TAMPA,
Plaintiff-Appellee,

versus

TRANSAMERICA INSURANCE GROUP,
Defendant-Appellant.

Appeals from the United States District Court for the Middle District of Florida

—

(April 3, 1992)

Before ANDERSON, Circuit Judge, HILL, Senior Circuit Judge, and YOUNG*, Senior District Judge.

PER CURIAM:

---

*Honorable George C. Young, Senior U.S. District Judge for the Middle District of Florida, sitting by designation.

Appellants argue that the district court committed reversible error by admitting into evidence the affidavit of Judy Garrabrant. Appellants argue that the affidavit did not satisfy the requirements of Fed.R.Evid. 803(5). After a careful review of the testimony of Judy Garrabrant, we conclude that each of the prerequisites for admission of a recorded recollection under Fed.R.Evid. 803(5) was satisfied, including the element relating to adoption by the witness when the matter was fresh in the witness' memory. Judy Garrabrant testified to this effect at trial. The district court was in a better position than this court to evaluate the testimony. Under the circumstances of this case, we cannot conclude that the district court abused its discretion in admitting the affidavit.

The other issues raised on appeal by appellants are without merit and warrant no discussion. Because of our resolution of this case, the issue raised by cross-appellant is moot.

The judgment of the district court is

AFFIRMED.[1]

---

[1] Appellees' pending motion to strike is denied.

Filed U.S. Court of Appeals
Eleventh Circuit
April 3, 1992
MIGUEL J. CORTEZ
CLERK

DO NOT PUBLISH

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

—

No. 91-3398

—

D. C. Docket No. 87-882-Civ-T-13C

CENTRAL BANK OF TAMPA,
Plaintiff-Appellant,

versus

TRANSAMERICA INSURANCE GROUP,
Defendant-Appellee.

—

No. 91-3418

—

D. C. Docket No. 87-882-Civ-T-13T

CENTRAL BANK OF TAMPA,
Plaintiff-Appellee,

versus

TRANSAMERICA INSURANCE GROUP,
Defendant-Appellant.

—

Appeals from the United States District Court
for the Middle District of Florida

—

Before ANDERSON, Circuit Judge, HILL, Senior Circuit Judge, and YOUNG*, Senior District Judge.

JUDGMENT

These causes came to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and were argued by counsel;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in these causes be and the same is hereby AFFIRMED;

It is further ordered that in case 91-3398 plaintiff-appellant shall pay to defendant-appellee the costs on appeal; and in case 91-3418 plaintiff-appellee shall pay to defendant-appellant the costs on appeal to be taxed by the Clerk of this Court.

---

*Honorable George C. Young, Senior U.S. District Judge for the Middle District of Florida, sitting by designation.

Entered: April 3, 1992
For the Court: Miguel J. Cortez, Clerk

By: KARLEEN McNABB
Deputy Clerk

ISSUED AS MANDATE: July 22, 1992

Filed U.S. Court of Appeals
Eleventh Circuit
June 3, 1992
MIGUEL J. CORTEZ
CLERK

DO NOT PUBLISH

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

—

No. 91-3398

—

CENTRAL BANK OF TAMPA,
Plaintiff-Appellant,

versus

TRANSAMERICA INSURANCE GROUP,
Defendant-Appellee.

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No. 91-3418

—

CENTRAL BANK OF TAMPA,
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versus

TRANSAMERICA INSURANCE GROUP,
Defendant-Appellant.

—

On Appeal from the United States District Court
for the Middle District of Florida

—

ON PETITION(S) FOR REHEARING
(. .)

BEFORE: ANDERSON, Circuit Judge, HILL, Senior Circuit Judge and YOUNG*, Senior District Judge.

PER CURIAM:

The Petition(s) for Rehearing filed by appellant/appellee, Central Bank of Tampa, is Denied.

ENTERED FOR THE COURT:

_____

UNITED STATES CIRCUIT JUDGE

---

*Honorable George C. Young, Senior U.S. District Judge for the Middle District of Florida, sitting by designation.

Filed U.S. Court of Appeals
Eleventh Circuit
July 22, 1992
MIGUEL J. CORTEZ
CLERK

DO NOT PUBLISH

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

—

No. 91-3398

—

CENTRAL BANK OF TAMPA,
Plaintiff-Appellant,

versus

TRANSAMERICA INSURANCE GROUP,
Defendant-Appellee.

—

No. 91-3418

—

CENTRAL BANK OF TAMPA,
Plaintiff-Appellee,

versus

TRANSAMERICA INSURANCE GROUP,
Defendant-Appellant.

—

On Appeal from the United States District Court
for the Middle District of Florida

O R D E R:

(XX) The motion of *Central Bank of Tampa,* for (XX) stay ( ) recall and stay issuance of the mandate pending petition for writ of certiorari is DENIED.

( ) The motion of *Central Bank of Tampa,* for (XX) stay ( ) recall and stay of the mandate pending petition for writ of certiorari is GRANTED to and including _____, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period mentioned above there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

Central Bank of Tampa's objections to the bill of costs is DENIED.

/s/ R. LANIER ANDERSON, III
UNITED STATES CIRCUIT JUDGE

(Transcript Pages 5-8)

THE COURT: All right, Gentlemen, I will be glad to hear you.

MR. CRAIG: The first thing is, Judge, we have agreed to stipulate to virtually every element of the Plaintiff's case, including the amount of damages to the building which is the subject of the policy.

However, two matters arise out of that. The first is, is that it is the Defendant's contention that the policy provides coverage only for loss to the building and, of course, the Plaintiff disputes that.

I think that that is a legal issue which the Court needs to address before we start making argument to the jury.

And the second thing is, is that —

THE COURT: I'm sorry. Coverage only to —

MR. CRAIG: Only to the building.

THE COURT: The building?

MR. CRAIG: Yes, Judge.

As you recall, this is proceeding through the assignment of the Central Bank mortgage.

THE COURT: Yes.

MR. CRAIG: It's our contention that the policy as to Central Bank provides only building coverage and not contents coverage.

THE COURT: I see.

MR. CRAIG: And the second matter is, is because the Defendant has now stipulated to every element of the Plaintiff's case and we are proceeding only on the affirmative defense of cancellation of the policy, I would request that the Court permit me to go first since the burden of proof is solely upon the Defendant in this case; and I have some authority to that effect, if you want to hear argument on that.

THE COURT: Sir?

MR. KELLY: May it please the Court. I think that the first thing we have to do is let the record reflect our stipulation.

MR. CRAIG: I agree with that.

THE COURT: I agree with that, too.

MR. KELLY: All right.

THE COURT: Either one of you may go ahead and just —

MR. CRAIG: I will recite our stipulation, if that's okay with you, Mr. Kelly.

MR. KELLY: Please.

MR. CRAIG: The Defendant Transamerica Insurance Company stipulates that a policy of insurance was issued with the effective dates March 21, 1986, through March 21, 1987.

The Defendant further stipulates that the Central Bank of Tampa was listed as a loss payable mortgagee on the declarations page of that policy.

The Defendant further stipulates that a fire occurred to the premises known as Lamas Restaurant, which was the subject of that policy, on or about June the 29th, 1986.

The Defendant further stipulates that a claim was made by Central Bank of Tampa in its capacity as a loss payable mortgagee and that that claim was denied by Transamerica Insurance Company.

The Defendant further stipulates that Central Bank of Tampa ultimately foreclosed its mortgage interest in that property and that the property was sold at foreclosure sale for an amount which was $152,981.20 less than the mortgage payoff amount.

THE COURT: A hundred fifty-two thousand —

MR. CRAIG: — Nine hundred eighty-one dollars twenty cents, less than the mortgage payoff amount on the date of the sale.

I would just like to clarify — there is, of course, some dispute in this case whether the — and I want to preserve this as an issue for appeal — whether the satisfaction of that mortgage in its entirety by Central Bank extinguished its cause of action against my client. We do not concede that.

Nonetheless, the Court, based upon its previous rulings, is apparently permitting Central Bank's interest to be pursued in this case, and the Defendant stipulates that that interest, such as it was, was assigned to R.W. Mashburn pursuant to an assignment of right of action, which, again, for purposes of preserving this as an issue on appeal, Defendant does not concede is a valid assignment of action. It's thoroughly briefed in the Court file.

Finally, the Defendant stipulates that the amount of the damages to the building was $108,427.21.

I should say, I guess, your Honor, that both parties stipulate to that.

* * *

(Transcript Pages 9-11)

MR. CRAIG: And, of course, the other thing, Judge, is the point I just made a moment ago, which is that since the burden falls entirely upon the Defendant to prove its affirmative defense, I would respectfully request that, in light of fairness and traditional notices of fair play, that the Defendant be permitted to present —

THE COURT: Let me hear Mr. Kelly's view on that.

MR. CRAIG: Certainly.

MR. KELLY: May it please the Court. I think we should add one explanation to the stipulation — counsel can accept it or not — and that is that the assignment by Central Bank of Tampa to R.W. Mashburn, Lamas Oriental Foods, Inc., and Lamas, Inc., was pursuant to an Order of the Bankruptcy Court, Pasquale Matassini being then in bankruptcy.

And while the foreclosure proceedings were proceeding and had reached the point of sale, the Bankruptcy Court, over the objection of R.W. Mashburn and the two corporations who were

second mortgagees, permitted the sale for an amount which precluded any payment at all to them as second mortgagees, but only on the condition that Central Bank of Tampa assign its unrecovered balance and the right of action against the insurance policy to R.W. Mashburn and those two corporations.

THE COURT: Do you disagree?

MR. CRAIG: I think that the order says —

THE COURT: The order speaks for itself.

MR. CRAIG: The order speaks for itself, exactly, Judge.

The Defendant does not concede that the Bankruptcy Court had the power to create such rights —

THE COURT: I understand that.

MR. CRAIG: — But I think that's an accurate statement of what the Bankruptcy Court's file will reflect.

THE COURT: Fine.

* * *

(Transcript Pages 21-23)

MR. KELLY: Now, your Honor, in view of the fact that we have now agreed that the only issue to be submitted to this jury is whether or not the mortgagee had Notice of Cancellation—

THE COURT: No. What we are going to do is, you're going to submit to the jury that there was a policy in effect at the time —

MR. KELLY: Yes.

THE COURT: — And that encompasses —

MR. KELLY: But it's been admitted now by — the reason that I was not willing to surrender my right to prove my case was because I considered that there were many points that were in issue,

We just settled one of them. We settled another one a few minutes ago when your Honor said you would decide the date for the prejudgment interest to begin.

So, now I conceive, as counsel stated then, that there is only one factual issue for the jury, and that is the Notice of Cancellation.

And that being the case, may it please the Court, since we have no other burden in this case, I will agree that counsel may proceed first to establish as its burden of proof the Notice of Cancellation.

THE COURT: Well, you are jumping from one to the other. I thought you took more of a burden on than was necessary, but you took it.

MR. KELLY: Well, that was because I thought there were other issues.

THE COURT: All right, Sir.

MR. CRAIG: Well, I kind of like the position the Plaintiff has put itself in, your Honor —

THE COURT: Well, I know you do, but I don't think that's fair and I'm not going to shoot a partridge on the ground. You go first.

MR. CRAIG: Very well.

THE COURT: All right.

Bring in the jury.

* * *

(Transcript Pages 33-39)

JUDY GARRABRANT,

Being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. CRAIG:

Q Ms. Garrabrant, where do you live?

A 1008 Newport Avenue in Lakeland, Florida.

Q Did you ever work for Transamerica Insurance Company?

A Yes, I did.

Q When was that that you worked for Transamerica?

A September '85 to September '86.

Q And where was the location or place of business for Transamerica where you worked at that time?

A It was in Atlanta, Georgia.

Q What was your job for Transamerica Insurance Services?

A I was a policy typist.

Q Would you describe for the jury the duties of a policy typist?

A I had to type endorsements, the policy, and cancellations.

Q Was it your responsibility to type cancellation notices?

A Yes, Sir.

Q What about envelopes that those notices might be sent in?

A I had to type those, too.

Q Let me show you a document which has not been marked for identification and ask you to examine it.

(PAUSE.)

Q Have you read that document?

A Yes, Sir.

Q What is that document entitled?

A That I was the one —

Q What is the title of the document?

A Oh, Title? It's an affidavit.

Q MR. KELLY: I'm sorry, I didn't hear the witness.

MR. CRAIG: Affidavit.

BY MR. CRAIG:

Q Does that document bear a signature?

A Yes, Sir, it does.

Q Whose signature?

A It has mine and the witness'.

Q You are able to identify that as your signature?

A Yes. Sir.

Q What is the date on that document?

A The 18th of September, 1987.

Q Is that a true and accurate copy of an affidavit signed by you on that date?

A Yes, Sir.

Q Now, do you presently today, Ms. Garrabrant, have sufficient recollection to enable you to testify fully and accurately about the matters set forth in that affidavit?

A No, I do not.

Q However, at the time you swore the affidavit, were the matters set forth therein fresh in your memory at that time?

A Yes, Sir.

Q And at the time you swore the affidavit, did you have knowledge and recollection of the matters set forth in that affidavit?

A Yes, I did.

Q Since you have stated that you signed that affidavit under oath, I assume that it correctly reflects your knowledge at that time; is that a fair statement?

A Yes, Sir, uh-huh.

MR. CRAIG: Your honor, at this time I would — I have no further questions for the witness.

THE COURT: All right. Is there any cross examination?

CROSS EXAMINATION

BY MR. KELLY:

Q Do I understand, Ms. Garrabrant, that you have no present knowledge concerning any of the matters set out in that affidavit?

A No, Sir.

Q You do not have?

A No, Sir.

Q Do you recall the circumstances under which you signed that affidavit?

A Yes, I do.

Q Were you in your place of business?

A Where I signed this? I didn't work for Transamerica, but I worked somewhere else and I was there when I signed it there.

Q Well, the date on it, again, is what?

A September the 18th, 1987.

Q And by whom were you employed at that time?

A Trust Company of Gwinnett.

Q I see. So, you were no longer working for Transamerica?

A Yes, sir,

Q Now, did somebody bring this paper to you to sign?

A I can't remember. I don't remember if — I guess it was, because I did sign it at that business, but I don't even remember.

Q Well, if you don't remember whether you actually signed it or not, you certainly don't remember if you knew at that time whether or not all of these matters stated there are true, did you?

MR. CRAIG: Objection. He's quarreling with the witness, your Honor.

THE COURT: The objection is overruled.

MR. CRAIG: Thank you, your Honor.

THE WITNESS: At that time — that was in 1987 — it hadn't been that long and I remembered it. But it is now 1991; a lot of years have passed, and I just don't remember things that far back.

BY MR. KELLY:

Q Well, I only want to know how you remember that those facts were true then if you don't remember signing it and don't know if they are true now or not.

A Maybe I'm not understanding what you're trying to say.

I can say again that in 1987 it hadn't been that long; I hadn't been gone from Transamerica that long, and do remember it.

Now, I recognize this is my signature, and I also recognize the witness' signature, who also worked at that place of business.

Q At this new place of business?

A Yes, Sir.

Q But you don't remember who it was who brought you the paper?

A I would imagine it was maybe —

Q No, don't imagine...

THE COURT: No, No, from your own recollection.

THE WITNESS: I really don't remember back that far.

BY MR. KELLY:

Q And you don't really know whether the person who brought you the paper told you that this was true, or if it was actually true to your knowledge. Is that right?

A You mean the person that brought me this?

Q Yes.

A They — well, whoever brought it to me. I don't think they told me what it was. I don't — I really don't remember.

* * *

(Transcript Pages 39-42)

BY MR. CRAIG:

Q Now, this document, Ma'am, is under oath, isn't that right?

A Yes, Sir.

Q And you would not lie under oath, would you?

MR. KELLY: Just a moment —

THE WITNESS: No, Sir.

MR. KELLY: — May it please the Court. This is a grossly leading question.

THE COURT: It is, but it goes without saying that the witness has been sworn.

You understand the meaning of an oath, don't you, Ma'am?

THE WITNESS: That I'm saying that it was true at the time I signed this?

THE COURT: Yes.

THE WITNESS: Yes, Sir.

BY MR. CRAIG:

Q And is that the case. Ma'am, that it was true when you swore to it?

A Yes, Sir.

MR. CRAIG: I don't have anything further.

THE COURT: Let me see if I can't get it straight now.

MR. CRAIG: Certainly.

THE COURT: And you say that simply because you would not — I believe you're telling us you would not have signed it under oath if it were not true?

THE WITNESS: Yes, Sir.

THE COURT: But you really have no recollection of the factual matters that may be contained in that affidavit?

THE WITNESS: Not at the present time.

THE COURT: And you don't remember whether you remembered it at the time you signed it?

THE WITNESS: I don't think I would have signed it if I didn't remember.

THE COURT: Well, is that because of habit, your custom of not to sign anything that is not factual if it's under oath?

THE WITNESS: Yes, Sir.

THE COURT: All Right. Any further examination by anybody? Mr. Kelly?

MR. KELLY: Yes. May it please the Court.

May I see the document, please?

RECROSS EXAMINATION

BY MR. KELLY:

Q Now, this paper that has been handed to you as an exhibit entitled "Affidavit" says, "On June 3, 1986, I mailed a copy of the Notice of Cancellation or Non Renewal attached hereto" — that is, to the affidavit — "To" — and then you say under "two" below that, "Central Bank of Tampa, Post Office Box 4115, Tampa, Florida 33677."

Do you have any personal recollection of having done so at this time?

MR. CRAIG: Objection, your Honor. She's already testified —

THE COURT: She's already answered that —

MR. CRAIG: Correct.

THE COURT: — In the negative.

MR. KELLY: All right.

BY MR. KELLY:

Q Do you have a present recollection that when you signed this paper, everything in it you knew to be true?

A At that time? Yes, Sir.

Q You have a present recollection?

A Oh, present? I'm sorry. Present recollection, No.

* * *

(Transcript Pages 42-43)

BY MR. CRAIG:

Q For clarification, Ma'am, do you presently recall that when you signed this affidavit, it was true?

A At the time I signed the affidavit, yes, I'm — I wouldn't have signed it if it wasn't true.

Q And would it be fair to say that you knew it was true at the time — you presently recall that you knew it was true at the time?

MR. KELLY: Again, I have to object to leading.

THE COURT: It's leading. The objection is well taken.

BY MR. CRAIG:

Q Would it or would it not be fair to say, Ma'am, that at the time — that you presently recall that you knew at the time that the matters in this affidavit were true, because they were more recent in time; would that or would that not be a fair statement?

A Let me see if I understand what you're saying.

Okay. You're saying do I presently recollect that at the time I signed the affidavit, I knew it was a true statement? Is that what you're —

Q For the reason I said —

A I'm all confused now.

Q For the reason I said, which is that it was more recent in time than today.

A Oh, yes. Now —

MR. KELLY: Your Honor, we object to leading the witness.

THE COURT: All right. Overruled.

BY MR. CRAIG:

Q Your answer, Ma'am?

A Wait a minute. Start all over.

Q My question was that when you say that you recall today that it was true then, is that because it was more recent in time?

A Right. It was fresher in my mind at that time, yes, sir.

Q Than today?

A Than today.

* * *

(Transcript Pages 44-45)

BY MR. KELLY:

Q Do you have any present recollection, Ma'am, of this document entitled "Notice of Cancellation or Non Renewal," which is marked here as Plaintiffs' Exhibit 20?

A I know I did it at the time, because I recognize my writing.

But as far as remembering doing it at this present time, no, I don't.

Q Do you understand that this is the document which is the subject matter of the affidavit?

A Yes, Sir.

Q You understand that?

A Yes, Sir.

Q Now, at the bottom of this document, there's a line which says "Name and Address." Opposite "Name" it has what?

A "Central Bank of Tampa."

Q All right.

Do you have any present recollection of having typed that in?

A No, Sir.

Q And what does it say opposite "Address"?

MR. CRAIG: Objection. The document speaks for itself.

THE COURT: Well, that's all right. The objection is overruled.

THE WITNESS: It says, "AFCO Number 25266 Dash 7."

BY MR. KELLY:

Q Is that an address?

A No, Sir.

Q It's certainly not an address for Central Bank of Tampa, is it?

A No, Sir. I don't think they would get it.

Q You don't think they would get it?

A No, Sir.

MR. KELLY: I have no more questions.

THE COURT: Do you have any recollection as to why that was done in that fashion?

THE WITNESS: I really don't. I don't remember too much about it.

* * *

(Transcript Pages 46-47)

BY MR. CRAIG:

Q On Page 2 of this document that Mr. Kelly just showed you, is there a signature line on there —

A Yes.

Q — At the bottom of the document?

A Yes, Sir.

Q Whose signature is that?

A That's mine.

Q You recognize that as your signature?

A Yes, Sir.

Q And do you see, Ma'am, that that document certifies over your signature that you personally mailed a Notice of Cancellation or Non Renewal to the lienholder, an exact copy of which appears above?

A Yes, Sir.

Q And you would not have certified that, or would you, were it not true?

MR. KELLY: Objection, may it please the Court; leading the witness.

THE COURT: No, he has a right to cross-examine. This is a new matter.

BY MR. CRAIG:

Q Ma'am, you would not have signed and certified that if it were not true, would you?

A No, Sir.

* * *

(Transcript Pages 47-48)

Q Take a look at what was been admitted as Defendant's 55, if you would, and describe what you see on Page 2 of that document. What is it, generically?

A It's Transamerica's envelope where we mailed documents out, and it says on it "AFCO" and it has the address: 2990 Brandywine Road, Suite 100, Atlanta, Georgia 30341.

Q And there's also some handwriting on that envelope, is there not, Ma'am?

A Yes, there is.

Q What is it?

A I'm not real sure. It might have been —

Q Is it words, numbers?

A It's numbers.

Q Do you recognize the handwriting of those numbers?

A Yes, Sir, it's my handwriting.

Q Thank you very much.

* * *

(Transcript Pages 48-49)

BY MR. KELLY:

Q Now, you have been asked by the Defendant's lawyer about the text of this Notice of Cancellation or Non Renewal, which is Plaintiffs' Exhibit 20.

Will you tell us, please, if you did mail a copy of this Notice of Cancellation or Non Renewal to the lienholder, Central Bank of Tampa, to what address did you mail it?

A If I was just looking at this document —

THE COURT: I'm sorry, you have to keep your voice up.

THE WITNESS: Oh, I'm sorry.

If I was just looking at this document, I would not know what the address was.

BY MR. KELLY:

Q And you don't know as you sit there what the address was?

A No, Sir.

Q Wouldn't you in the normal course, if you had sent such a Notice to Central Bank of Tampa at its address, have put in the address where it calls for the address of Central Bank of Tampa?

A I think that was the normal procedure at that time.

* * *

(Transcript Page 49)

BY MR. CRAIG:

Q But you didn't in this case, correct?

A Correct.

Q Was there some other source in the file of Transamerica Insurance Company at that time where you could have gotten the address of Central Bank of Tampa?

A I can't remember, but I would say I would have to look through all the paperwork in the policy to find it.

Q And you don't have that here with you today?

A No, Sir.

* * *

(Transcript Pages 115-116)

THE COURT: All right. Let's move.

MR. CRAIG: Okay. I'm going to read to the jury now, your Honor, the affidavit of Judy Garrabrant.

THE COURT: That she testified to?

MR. CRAIG: That she testified about having executed.

THE COURT: You may do that.

MR. CRAIG: Affidavit, State of Florida, County of Gwinnett.

Before me, the undersigned authority, personally appeared Judy Garrabrant who first being sworn duly deposes and says: My name is Judy Garrabrant and I was an employee of Transamerica Insurance Company, 2220 Parklake Drive, Northeast, Suite 550, Atlanta, Georgia 30345.

As part of my regular duties at Transamerica, I was responsible for mailing Notices of Cancellation or Non Renewal to various clients.

On June 3, 1986, I mailed a copy of the Notice of Cancellation or Non Renewal attached hereto to: one, Teresa Oriental Foods, Incorporated, doing business as Lamas Restaurant and Pasquale Matassini, at 3699 Gandy Boulevard, Tampa, Florida 33611; two, Central Bank of Tampa, Post Office Box 4115, Tampa, Florida 33677; three, AFCO Credit Corporation, 2990 Brandywine Road, Suite 100, Atlanta, Georgia 30341; and four, American Insurance Center, Post Office Box 271290, Tampa, Florida 33688.

All were mailed U.S. regular mail except to Teresa Oriental Foods, Incorporated, doing business as Lamas Restaurant and Pasquale Matassini, which was mailed certified mail.

Each of the four Notices of Cancellation or Non Renewal were mailed with the proper postage. All envelopes had the return address of Transamerica Insurance Company as well as the policy number listed, and I would have received back all undeliverable notices. I did not receive back any of the notices sent, including the notice sent to Central Bank of Tampa.

Further affiant saith not, signed Judy Garrabrant; sworn and subscribed to by me this 18th day of September, 1987; Notary Public: Jan Upchurch.

THE COURT: Thank you.

All right, members of the jury, I will give you a brief recess.

BEST AVAILABLE COPY

APPENDIX A-28

NOTICE OF CANCELLATION OR NONRENEWAL

(Florida)

OF _____
KIND OF POLICY

POLICY NO.	ISSUED THROUGH AGENCY OR OFFICE AT:	CANCELLATION OR TERMINATION WILL TAKE EFFECT AT: (DATE) (HOUR—STANDARD TIME)	DATE OF MAILING
19905574	American Ins. Center Tampa, Fl. 623027	6-18-86 12:01 A.M.	6-3-86

INSURANCE COMPANY: Transamerica Insurance CO.
2220 Parklake Dr. NE SUite 550
Atlanta, Ga. 30345

PREMIUM $ _____
EXPIRATION _____
RETURN PREMIUM $ _____
PREMIUM DUE $ _____

NAME AND ADDRESS OF INSURED: Teresa Oriental Foods, Inc. DBA
Lamas Restaurant & Pasquale Mattasini
3699 Gandy Blvd.
Tampa, Fl. 33611

(Applicable item marked ☒)

CANCELLATION

☐ You are hereby notified in accordance with the terms and conditions of the above mentioned policy that your insurance will cease at and from the hour and date mentioned above.
If the premium has been paid, premium adjustment will be made as soon as practicable after cancellation becomes effective.
If the premium has not been paid, a bill for the premium earned to the time of cancellation will be forwarded in due course.

☐ You are hereby notified in accordance with the terms and conditions of the above mentioned policy that your insurance will cease at and from the hour and date mentioned above due to nonpayment of premium.
A bill for the premium earned to the time of cancellation will be forwarded in due course.

☒ You are hereby notified in accordance with the terms and conditions of the above mentioned policy that your insurance will cease at and from the hour and date mentioned above.
If the premium has been paid, premium adjustment will be made as soon as practicable after cancellation becomes effective.
If the premium has not been paid, a bill for the premium earned to the time of cancellation will be forwarded in due course.
Reason(s) for cancellation: Non Payment

☐ You are hereby notified in accordance with the terms and conditions of the above mentioned policy that your insurance will cease at and from the hour and date mentioned above.
If the premium has been paid, premium adjustment will be made as soon as practicable after cancellation becomes effective.
If the premium has not been paid, a bill for the premium earned to the time of cancellation will be forwarded in due course.
Reason(s) for cancellation: _____

You are permitted by law to appeal this cancellation. Appeal should be filed before the effective date of cancellation set forth in this Notice. Forms for such appeal and the regulations pertaining thereto may be obtained from the offices of the Department of Insurance. Appeals must be accompanied by a deposit. You or this Company may be charged with the costs of the appeal, depending on the outcome.

NON-RENEWAL

☐ You are hereby notified in accordance with the terms and conditions of the above mentioned policy that the above mentioned policy will expire effective at and from the hour and date mentioned above and the policy will NOT be renewed.

☐ You are hereby notified in accordance with the terms and conditions of the above mentioned policy that the above mentioned policy will expire effective at and from the hour and date mentioned above and the policy will NOT be renewed.
Reason(s) for nonrenewal: _____

IMPORTANT NOTICES

Florida Joint Underwriting Association Information: You have been notified herewith that this Company does not desire to carry your automobile insurance any longer. You are possibly eligible for automobile insurance through another insurer or through the Florida Joint Underwriting Association. For further information regarding replacement insurance, either from another insurer or through the Association, please consult your agent or company representative. This notification of the availability of the Florida Joint Underwriting Association is given pursuant to the provisions of Section 627.728 of the Florida Statutes.

☐ Consumer Report: In compliance with the Fair Credit Reporting Act (Public Law 91-508), you are hereby informed that the action taken above is being taken wholly or partly because of information contained in a consumer report from the following consumer reporting agency:

_____ (NAME)
_____ (ADDRESS)

_____
Authorized Representative

(Duplicate of Notice of Cancellation or Termination to Lienholder)

You are hereby notified that the agreement under the Loss Payable Clause payable to you as Lienholder, which is a part of the above policy, issued to the above insured, is hereby cancelled (or terminated) in accordance with the conditions of the policy, said cancellation (or termination) to be effective on and after the hour and date mentioned above.

_____
Authorized Signature

INSURANCE COMPANY: Transamerica Insurance Co.
2220 Parklake Dr. NE Suite 550
Atlanta, Ga. 30345 CLIENT, DATE E. CUTLER 8/28/86

NAME AND ADDRESS OF LIENHOLDER: Central Bank of Tampa
APCO #25266-7

including cancellation or nonrenewal subject to Section 627.728 of the Florida Statutes.

For notice of cancellation, mark—
(1) the first box to cancel a policy NOT subject to Section 627.728, and the first box should NOT be used for cancelling a policy for nonpayment of premium.
(2) the second box to cancel a policy for nonpayment of premium, including cancellation subject to Section 627.728
(3) the third box to cancel a policy subject to Section 627.728 when a policy is an original (not a renewal) policy in effect less than 60 days of the date the Notice is to be mailed, except the third box should not be used for cancelling a policy for nonpayment of premium. The reason for cancellation must be stated in the Notice.
(4) the fourth box to cancel a policy subject to Section 627.728 when

(Applicable item marked ☒)

CANCELLATION

☐ You are hereby notified in accordance with the terms and conditions of the above mentioned policy that your insurance will cease at and from the hour and date mentioned above.
If the premium has been paid, premium adjustment will be made as soon as practicable after cancellation becomes effective.
If the premium has not been paid, a bill for the premium earned to the time of cancellation will be forwarded in due course.

☐ You are hereby notified in accordance with the terms and conditions of the above mentioned policy that your insurance will cease at and from the hour and date mentioned above due to nonpayment of premium.
A bill for the premium earned to the time of cancellation will be forwarded in due course.

☒ You are hereby notified in accordance with the terms and conditions of the above mentioned policy that your insurance will cease at and from the hour and date mentioned above.
If the premium has been paid, premium adjustment will be made as soon as practicable after cancellation becomes effective.
If the premium has not been paid, a bill for the premium earned to the time of cancellation will be forwarded in due course.
Reason(s) for cancellation: Non Payment

☐ You are hereby notified in accordance with the terms and conditions of the above mentioned policy that your insurance will cease at and from the hour and date mentioned above.
If the premium has been paid, premium adjustment will be made as soon as practicable after cancellation becomes effective.
If the premium has not been paid, a bill for the premium earned to the time of cancellation will be forwarded in due course.
Reason(s) for cancellation: _____

You are permitted by law to appeal this cancellation. Appeal should be filed before the effective date of cancellation set forth in this Notice. Forms for such appeal and the regulations pertaining thereto may be obtained from the offices of the Department of Insurance. Appeals must be accompanied by a deposit. You or this Company may be charged with the costs of the appeal, depending on the outcome.

NON-RENEWAL

☐ You are hereby notified in accordance with the terms and conditions of the above mentioned policy that the above mentioned policy will expire effective at and from the hour and date mentioned above and the policy will NOT be renewed.

☐ You are hereby notified in accordance with the terms and conditions of the above mentioned policy that the above mentioned policy will expire effective at and from the hour and date mentioned above and the policy will NOT be renewed.
Reason(s) for nonrenewal: _____

IMPORTANT NOTICES

Florida Joint Underwriting Association Information: You have been notified herewith that this Company does not desire to carry your automobile insurance any longer. You are possibly eligible for automobile insurance through another insurer or through the Florida Joint Underwriting Association. For further information regarding replacement insurance, either from another insurer or through the Association, please consult your agent or company representative. This notification of the availability of the Florida Joint Underwriting Association is given pursuant to the provisions of Section 627.728 of the Florida Statutes.

☐ Consumer Report: In compliance with the Fair Credit Reporting Act (Public Law 91-508), you are hereby informed that the action taken above is being taken wholly or partly because of information contained in a consumer report from the following consumer reporting agency:

(NAME) _____

(ADDRESS) _____

Anne Smith
Authorized Representative

(Duplicate of Notice of Cancellation or Termination to Lienholder)

You are hereby notified that the agreement under the Loss Payable Clause payable to you as Lienholder, which is a part of the above policy, issued to the above insured, is hereby cancelled (or terminated) in accordance with the conditions of the policy, said cancellation (or termination) to be effective on and after the hour and date mentioned above.

Anne Smith
Authorized Representative

INSURANCE COMPANY

Transamerica Insurance Co.
2220 Parklake Dr. NE Suite 550
Atlanta, Ga. 30345

NAME AND ADDRESS LIENLDER

Central Bank of Tampa
AFCO #25266-7

CERTIFICATION

I hereby certify that I personally mailed in the U.S. Post Office at the place and time stamped hereon, a notice of cancellation or nonrenewal to the insured and, if required, to the Lienholder, an exact carbon copy of which appears above, and at said time received from the U.S. Postal Service the receipt made a part hereof or attached hereto.

Signed this 3 day of June 19 86

Signature Judy Garrabrant

Use for giving notice of cancellation or nonrenewal of automobile insurance, including cancellation or nonrenewal subject to Section 627.728 of the Florida Statutes.

For notice of cancellation, mark—
(1) the first box to cancel a policy NOT subject to Section 627.728, except the first box should NOT be used for cancelling a policy for nonpayment of premium.
(2) the second box to cancel a policy for nonpayment of premium, including cancellation subject to Section 627.728
(3) the third box to cancel a policy subject to Section 627.728 when such policy is an original (not a renewal) policy in effect less than 60 days as of the date the Notice is to be mailed, except the third box should NOT be used for cancelling a policy for nonpayment of premium. The reason(s) for cancellation must be stated in the Notice.
(4) the fourth box to cancel a policy subject to Section 627.728 when such policy is (a) an original (not a renewal) policy in effect 60 days or more as of the date the Notice is to be mailed or (b) a renewal policy regardless of the length of time it has been in effect, except the fourth box should NOT be used for cancelling a policy for nonpayment of premium. The reason(s) for cancellation must be stated in the Notice.

For notice of nonrenewal, mark—
(1) the fifth box if nonrenewal is NOT subject to Section 627.728.
(2) the sixth box if nonrenewal is subject to Section 627.728. The reason(s) for nonrenewal must be stated in the Notice.

NOTE: When notice of cancellation or nonrenewal is issued with respect to a policy subject to Section 627.728, Notice MUST also be sent to the named insured's agent at the same time it is sent to the named insured.

MAILING: For Registered Mail or Certified Mail Notice of Cancellation or Nonrenewal to the insured and, if required, to the Lienholder, the appropriate U.S. Postal Service receipt must be attached hereto and no postage stamps should be affixed to the receipt reproduced hereon.

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No. 92-445

FILED
OCT 9 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1992

CENTRAL BANK OF TAMPA, f/u/b/o R.W. MASHBURN, LAMAS ORIENTAL FOODS, INC. AND LAMAS, INC.,

Petitioner,

vs.

TRANSAMERICA INSURANCE GROUP,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Does the Eleventh Circuit's affirmance of the trial court's admission of certain evidence under Rule 803(5), Federal Rules of Evidence, conflict with any decision of any other circuit?

II. Did the admission of certain evidence pursuant to Rule 803(5), Federal Rules of Evidence, by the trial court, or the affirmance of this ruling by the Eleventh Circuit, constitute a departure from the accepted and usual course of judicial proceedings, pursuant to Rule 10, Supreme Court Rules, so as to invoke the discretionary jurisdiction of this Court?

III. Did the trial court's admission of certain evidence under Rule 803(5), Federal Rules of Evidence, deny petitioner any right of due process?

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APPENDIX

Appendix A 1a

No. 92-445

In The

Supreme Court of the United States

October Term, 1992

CENTRAL BANK OF TAMPA, f/u/b/o R.W. MASHBURN, LAMAS ORIENTAL FOODS, INC. and LAMAS, INC.,

Petitioner,

vs.

TRANSAMERICA INSURANCE GROUP,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Plaintiff and appellant below, and petitioner in this Court, Central Bank of Tampa (Central Bank), sued Transamerica Insurance Group (Transamerica), to establish coverage under a certain policy of fire insurance issued by Transamerica for which

Central Bank was a beneficiary. Transamerica answered the complaint, alleging the policy had been cancelled prior to the fire. Transamerica moved for summary judgment and supported its motion with the affidavit of a former Transamerica employee, Judy Garrabrant. In that affidavit, Garrabrant swore that she had prepared and mailed a Notice of Cancellation to Central Bank and three other interested entities at their addresses. Transamerica's motion for summary judgment was denied and the action went to trial by jury. At trial, Transamerica stipulated to all elements of Central Bank's case-in-chief and the parties agreed on the major elements of damages. The case was tried solely on the affirmative defense that the policy had been cancelled by Transamerica prior to the fire.

In its case, Transamerica called Garrabrant to the stand. Through Garrabrant's testimony, Transamerica established that:

1. Garrabrant had executed the affidavit submitted in support of the Motion for Summary Judgment;

2. Garrabrant had knowledge and recollection of the contents of the affidavit when she executed it. But, she did not have sufficient recollection currently to testify fully and accurately to the matters set forth in the affidavit;

3. The contents of the affidavit were fresh in Garrabrant's memory at the time she executed the affidavit;

4. The affidavit correctly reflected Garrabrant's knowledge when she executed it;

5. Garrabrant would not have executed the affidavit if it were not true.

The pertinent portions of Garrabrant's testimony are set out in the appendix. Petitioner took full opportunity to cross-examine Garrabrant, and the court also inquired as to the witness' recollection. Transamerica moved to have the contents of the affidavit accepted as recorded recollection under Federal Rule of Evidence 803(5) and read to the jury. Central Bank objected chiefly on the basis the witness' knowledge was not fresh when recorded. The trial court overruled the objection and the affidavit was read to the jury. The jury found Garrabrant credible, accepted her testimony and returned a verdict for Transamerica.

The pertinent dates are as follows: Garrabrant prepared and mailed the cancellation notices on June 3, 1986. The fire occurred on June 29, 1986. Garrabrant executed the affidavit on September 18, 1987. Garrabrant testified at trial on January 28, 1991 .

Central Bank appealed the verdict to the Eleventh Circuit arguing, in pertinent part, as follows:

The court erred in permitting this hearsay statement to be admitted as substantive evidence because:

1. The pertinent fact was not recorded by the witness but by the unidentified person or persons who prepared the affidavit fifteen (15) months after the event.

2. The address of the Bank did not appear in the Notice and there was no evidence regarding its source, except that it obviously was not obtained from the witness or the Notice.

3. It could not be pretended, and the witness didn't pretend, that she remembered on September 18, 1987, the exact addresses of

three entities in Tampa, Florida to whom she allegedly mailed copies of a Notice fifteen (15) months earlier in another employment.

4. The affidavit was prepared for the purpose of supporting the Insurance Company's defense of cancellation by an attorney or other knowledgeable agent after the filing of the action on the policy.

Additionally, the extreme unreliability of the affidavit as substantive evidence, even if it were admissible in corroboration, precludes its sufficiency to carry Defendant's burden of proof as the only evidence offered on the issue.

Initial Brief of Appellant Central Bank in the Eleventh Circuit.

The Eleventh Circuit affirmed, concluding in its unpublished opinion that each of the prerequisites for admission of Garrabrant's recorded recollection under Fed. R. Evid. 803(5) was satisfied. All other issues on appeal, including the attack on the sufficiency of the evidence, were summarily dismissed for want of merit. This petition of Central Bank followed.

Petitioner states in its petition that Garrabrant's affidavit was "fabricated" and submitted at trial with intent to deceive the trial court and jury. This is not true. Petitioner's Statement of Questions Presented gives the impression the trial court found, as a matter of fact or law, that Garrabrant's affidavit was fabricated and false and yet allowed it as evidence to establish an essential fact at trial, and further, that the Eleventh Circuit affirmed this imagined procedure.

Petitioner misleads this Court by giving this impression. The facts are as follows: Transamerica called affiant Garrabrant to the

stand and laid a foundation pursuant to Rule 803(5) to publish the affidavit to the jury. Petitioner cross-examined affiant as to the freshness of her recollection and objected to the publication on the basis her recollection was not fresh. The trial court found a proper foundation was set and overruled the objection. The jury found Garrabrant credible and accepted her testimony. The Eleventh Circuit found no error.

Thus, the only judicial determinations as to the status of the affidavit are the trial and appellate courts' rulings that the affidavit is admissible evidence; further, there has been only one determination of the truth of the affidavit, and that is the jury's verdict finding the contents of the affidavit to be true. There is no basis for petitioner to characterize this evidence as "fabricated" and false and claim that the respondent and the trial and appellate courts knew it to be such.

SUMMARY OF REASONS FOR DENYING THE WRIT

This Court need not review the Eleventh Circuit's holding that the trial court committed no error in admitting the recorded recollection under Fed. R. Evid. 803(5). The trial court considered the prerequisites for admission of this evidence as set out in Rule 803(5)and found that the evidence adduced from Garrabrant provided a sufficient foundation for its admission. Facts casting doubt on the ability of the declarant to recall the matter go to the weight of the evidence but not its admissibility. It was for the jury to weigh the evidence. The Eleventh Circuit's relatively simple task on appeal was to compare the evidence adduced to the requirements of Rule 803(5); its holding that sufficient evidence was presented to admit the evidence for the jury's consideration is supported by the record and does not conflict with any decision of any other circuit.

Therefore, the trial and appellate courts' actions do not

constitute a departure from the usual course of proceedings under Supreme Court Rule 10.

The due process clause of the Constitution is not involved in this case as the power of the court was not used to deny the petitioner of any property interest.

Petitioner petitions this Court to review the trial judge's discretionary ruling to admit certain evidence. This straightforward issue, addressed and resolved in the Eleventh Circuit, is not a proper one for this Court's consideration.

REASONS FOR DENYING THE WRIT

I.

THERE IS NO CONFLICT BETWEEN THE ELEVENTH CIRCUIT'S HOLDING AND ANY DECISION OF ANY OTHER CIRCUIT.

A. Background to Rule 803(5).

Federal Rule of Evidence 803(5) provides for the admission of certain hearsay evidence where that evidence constitutes "recorded recollection." Recorded recollection is defined in the rule as a

1. memorandum or record concerning a matter;

2. about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately;

3. shown to have been made or adopted by the witness when the matter was fresh in the witness' memory;

4. and to reflect that knowledge correctly.

The trial court exercises its discretion to determine if these four foundation requirements are satisfied. *United States v. Patterson*, 678 F.2d 774 (9th Cir. 1982). As the court explains:

> [A] district judge's ruling to admit evidence will not be overturned absent abuse of discretion. [citations omitted.] The trial judge has broad discretion in determining whether evidence is supported by proper foundation . . . Broad discretion for the trial judge is clearly intended under Fed. R. Evid. 803(5), as the advisory committee notes indicate: "No attempt is made in the exception to spell out the method of establishing the initial knowledge or the contemporaniety and accuracy of the record, leaving them to be dealt with as the circumstances of the particular case might indicate."

Id. at 778-779.

Once the trial judge determines that sufficient evidence has been provided as to the four elements of the foundation to allow presentation of the evidence to the jury, the contents of the memorandum are read into evidence. The document itself is not received. The truth of the contents is determined by the trier of fact.

Facts casting doubt on the ability of the declarant to recall the matters in question go to the weight of the testimony, but do not preclude admission of the statement. *United States v. Williams*, 571 F.2d 344, 349 (6th Cir. 1978). *See also United States v. Senak*, 527 F.2d 129, 139 (7th Cir. 1975), *cert. denied*, 425 U.S. 907 (1976) (party opposed admission of recorded recollection on the grounds

that matter was not fresh in declarant's mind when recorded; full cross-examination allowed on this point and court holds that issue of freshness was one that goes to the weight of the evidence and *not* its admissibility); *and see also, United States v. Edwards*, 539 F.2d 689, 692 (9th Cir. 1976) (veracity and freshness of declarant's statements, when made or adopted, are subjects for impeachment by cross-examination before the jury; statement need not be recorded at time of event and there is no time limit for declarant to have accurate recollection; the trial judge must be free to consider, on a case-by-case basis, whether or not to admit the evidence).

B. The Eleventh Circuit's holding does not conflict with any decision of any other circuit.

Petitioner urges the Eleventh Circuit's holding on the application of Rule 803(5) conflicts with eight decisions from other circuits. The petitioner is wrong, no conflict is demonstrated. All eight cases were cited by petitioner in its appellate brief to, and therefore were considered by, the Eleventh Circuit. The purported conflict for each case is addressed in turn:

1. *Dickinson Supply, Inc. v. Montana-Dakota Utilities Co.*, 423 F.2d 106 (8th Cir. 1970). This case is cited by petitioner for the proposition that a witness' signature on a statement does not satisfy the requirement that the witness' memory be fresh when the recollection is recorded.

Dickinson dealt with a witness who allegedly gave a statement to a fire marshal. At trial this witness denied making the statement and specifically denied the truth of the matters contained in the statement but he admitted his signature on the statement. The trial court allowed this statement to be received as substantive evidence over the witness' denials. This ruling was reversed on appeal. This case actually stands for the proposition that where the declarant specifically denies the truth of the recorded recollection, the

evidence cannot be received. *Id.* at 109, n.1. In light of this denial, the court held the mere signing of a document is not enough to establish its truthfulness and admissibility. The instant case contains no such problem as the declarant, Garrabrant, acknowledged she executed and adopted the statement and resolutely claimed the statement to be truthful. *Dickinson* does not preclude the result reached in this case. There is no conflict.

2. *Goings v. United States*, 377 F.2d 753 (8th Cir. 1967). This case is cited by petitioner apparently for the proposition that even where the declarant admits the truthfulness of the recorded recollection, it is error to admit the recorded recollection because to do so would allow trial by prepared statements.

Goings is a criminal case that expressly does *not* deal with past recollection recorded. *Id.* at 760, n.8. The government, in *Goings*, introduced the contents of a prior signed statement of a hostile witness under the guise of refreshing the witness' recollection. The Eighth Circuit held that introducing the prior statement by this subterfuge was error. The Eighth Circuit clearly and deliberately distinguished the recorded recollection rule, Rule 803(5), from the issue in *Goings*. Therefore, *Goings* is not relevant to the instant case.

3. *O'Malley v. U.S. Fidelity and Guarantee Co.*, 776 F.2d 494 (5th Cir. 1985). Petitioner apparently cites this case for the proposition that if the declarant testifies that he does not remember reading the recorded recollection, it must be rejected.

O'Malley actually speaks to the final requirement of Rule 803(5) stated above, that the recorded recollection be accurate. In this case, the Fifth Circuit held if the witness did not write the recording, he must at least testify that he read it and found it to be accurate. *Id.* at 500. In *O'Malley*, the witness could not do so as he had not read the report. *Id.* In this case, it is not contended

Garrabrant did not read the affidavit before signing it. To the contrary, Garrabrant testified that when she executed the affidavit, her memory of the facts was fresh and the contents of the affidavit were correct. Thus, the reason for rejecting the recorded recollection in *O'Malley* does not exist in this case.

4. *In re: Corrugated Container Antitrust Litigation*, 756 F.2d 411 (5th Cir. 1985). Petitioner cites this case for the proposition that the affidavit, the recorded recollection, should have been rejected because there was not specific testimony that the recording reflected the witness' knowledge correctly when the matter was fresh in memory. While this may be a correct reading of the cited case, it has no application to this case. Garrabrant specifically testified that the affidavit correctly reflected her knowledge when the matter was fresh in her memory. *See* testimony set forth in appendix.

5. *United States v. Judon*, 567 F.2d 1289 (5th Cir. 1978). Petitioner cites this case for the proposition that the failure of a witness to testify specifically that the recording correctly reflects the witness' knowledge when it was fresh in memory is reason for excluding the evidence.

The Fifth Circuit ruled, in *Judon*, that a piece of paper with a license tag number written on it should not have been admitted into evidence under Rule 803(5) because no proper predicate was laid. "In particular, there was no showing that the witness had insufficient recollection to enable him to testify fully and accurately at trial." *Id.* at 1294. This is the reason the Fifth Circuit held the trial court should have excluded the recorded recollection. The court then noted as an additional ground that the prosecution failed to adduce specifically that the witness recorded the recollection while the matter was fresh in his memory. *Id.* These concerns do not exist in this case. Garrabrant testified specifically both that she had no present recollection of the contents of the

recording and that the recording was made when the matter was fresh in her mind.

The *Judon* case also illustrates that the policy of discouraging the use of statements "carefully prepared for purposes of litigation under the supervision of attorneys, investigators, or claims adjusters", Fed. R. Evid. 803(5) advisory committee notes on 1972 proposed rules, is satisfied where the witness has insufficient recollection to enable her to testify fully at trial. In other words, so long as there is insufficient recollection at the time of trial, there is no danger of a "trial by affidavit" envisioned by the petitioner. The critical safeguard against such a danger, *i.e.*, the failure of current memory, is established in this case, as petitioner would readily admit.

6. *Cathey v. Johns-Manville Sales Corp.*, 776 F. 2d 1565 (6th Cir. 1985). Petitioner cites this case for the proposition that recorded recollection is not admissible under Rule 803(5) unless made when the matter was fresh in memory. Of course, this proposition is not in dispute. The trial judge in *Cathey* did not allow the asbestos-exposed plaintiff to refresh his recollection by referring to a list of products to which he may have been exposed. The list was developed by plaintiff during trial for the benefit of defendants, and was not intended to be used as a substitute for live testimony. *Id.* at 1582.

The plaintiff complained on appeal that pursuant to Rule 803(5), he should have been allowed to refer to the list while testifying. The reasons for the trial court's actions are not manifest from the opinion but the Sixth Circuit concluded the trial judge was correct in not allowing the plaintiff to refer to the list. The plaintiff was illiterate and the court stated "it is difficult to understand how a written exposure list could have assisted him. . . ." *Id.* Further, there was "little evidence to show that his exposure list correctly reflected fresh knowledge," *Id.* at 1583. Finally, "plaintiff had no

evidence to support the contention the list correctly reflected Mr. Cathey's actual exposure." *Id*.

The Sixth Circuit's affirmance of the trial judge's ruling highlights that it is for the trial court, as a matter of its discretion, to evaluate the adequacy of the evidence to satisfy foundation requirements for admission of evidence under Rule 803(5). In *Cathey,* the trial court determined that an inadequate foundation was laid. *Cathey* does not conflict with the case before this Court because of the presence, in this case, of evidence that the matters contained in the recorded recollection were, in fact, fresh in the mind of the declarant when recorded, and that the recording was accurate.

7. *Felice v. Long Island R.R. Co.*, 426 F.2d 192 (2d Cir. 1970). Petitioner cites this case for the proposition that the author of the recorded recollection, if not the declarant, must testify or the recorded recollection is inadmissible. This is an incorrect statement of the law and a misconstruction of *Felice*. The recorded recollection in *Felice* was a medical record made by a physician's employee. The witness, the physician, could not verify the record and did not adopt it, as provided in Rule 803(5). Thus, no foundation was laid to admit the evidence under Rule 803(5). *Id.* at 196. In the instant case, while Garrabrant did not draft the affidavit, she adopted it by signing it and swearing to the truthfulness of its contents. Because Garrabrant adopted the statement, the evidence was properly received. In *Felice* there was no adoption, and therefore the evidence should not have been received.

The law is clear, the drafter of the recording need not testify; only the witness who adopts the statement must testify. *United States v. Williams,* 571 F.2d 344, 348 (6th Cir. 1978) ("when the verifying witness has not prepared the report, but merely examined it and found it to be accurate, he has adopted the report, and it is therefore admissible"). The legislative history for adding the

"adoption" language to Rule 803(5), set out in 11 *Moore's Federal Practice*, Art. VII, p. 110, and cited in *Williams, supra*, reveals no requirement that the author or drafter of recorded recollection, as well as the declarant, testify before the recording is admissible. Petitioner cites no authority or precedent for its contrary reading of Rule 803(5).

8. *United States v. Schwartz*, 390 F.2d 1 (3d Cir. 1968). The petitioner cites this case for the proposition that where guarantees of truthfulness are outweighed by countervailing considerations, the recorded recollection should be excluded. There can be no quarrel with this general proposition. But *Schwartz* presents no conflict with the Eleventh Circuit's opinion in this case. *Schwartz* dealt with the admissibility of a letter drafted by one criminal co-defendant in the trial of the second codefendant. The letter was addressed to the judge in the first defendant's trial. The letter requested a lenient sentence and cast the blame for the crime on the second co-defendant. At the trial of the second co-defendant, the first co-defendant testified and repudiated both the accuracy of the letter as well as his signature.

The trial court permitted the government to introduce the letter as a prior inconsistent statement and received it as substantive evidence. The Third Circuit reversed stating that the guarantees of trustworthiness, *i.e.*, that it was actually prepared by the first co-defendant's attorney and that the witness admitted he would not sign something known by him to be false, were outweighed by the circumstances that the document "was made almost seven years after the events therein, and an obvious effort to obtain a light sentence, not under oath, and there was no opportunity for cross-examination. The imminence of sentence alone was conducive to falsification rather than to trustfulness." *Id.* at 5-6.

Schwartz sets out no rule of law that was ignored or

contradicted by the Eleventh Circuit. *Schwartz* only points out that the trial judge must balance the guarantees of truthfulness against countervailing considerations. In *Schwartz*, the balance tipped to exclusion. In this case, the trial judge found they tipped to admission. The facts of the two cases are far different and *Schwartz* does not command a result different than that reached in this case.

Even where the only guarantee of trustworthiness of the accuracy of the record is the declarant's assurance that he would not have signed or prepared the record unless he knew it to be true, the evidence will be admitted. 3 *Wigmore, Evidence,* 747 (Chadbourn Rev. 1970).

> Recall that the witness must be able *now* to assert that the record accurately represented his knowledge and recollection at the time . . . In general, it is conceded that when the witness' certainty rests on his usual *habit or course of business* in making memoranda or records, it is sufficient . . . Here the witness is really calling to his aid, not his specific business custom, but his general moral attitude; but, as a rule, the indication should be and is treated as sufficient.

Id. The trial judge asked Garrabrant:

> THE COURT: I believe you are telling us that you would not have signed it under oath if it were not true?
>
> THE WITNESS: Yes, sir.
>
> * * *
>
> THE COURT: Well, is that because of habit,

your custom of not to sign anything that is not factual if it's under oath?

THE WITNESS: Yes,sir.

(T40-41)

The conclusion of *Wigmore is* that this assurance, standing on its own, is legally sufficient to *admit* the evidence.[1] Once admitted past this minimal barrier, any conflict or weakness in the declarant's testimony goes to the *weight* of the evidence.

Petitioner never demonstrated that the evidence of trustworthiness was insufficient for *admission* of the recording. Petitioner can only point to weaknesses or purported inconsistencies in the evidence. But these weaknesses went only to the weight of the evidence, and to this issue, the jury spoke. Petitioner seeks to have the evidence reweighed by this Court, and if granted certiorari, will ask this Court to do so. Because the time for finding facts has passed, its petition should be denied.

II. There was no departure from usual course of proceedings requiring correction by this Court.

Respondent relies on its argument in section I, *supra,* that the ruling of the trial court was correct, and the affirmance by the Eleventh Circuit proper. As such, there was no departure from usual and ordinary course of proceeding requiring correction by this Court pursuant to Supreme Court Rule 10.

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1. In this case, the guarantees of trustworthiness went far beyond this minimal requirement: Garrabrant unequivocally adopted the recording; swore to the truth of the contents when she signed the affidavit; she recalled the circumstances under which she signed the affidavit; swore the contents of the affidavit were fresh in mind when adopted; swore the contents of the affidavit correctly reflected her then-fresh recollection; swore she would not have executed the affidavit unless the contents were true and correct.

III. The petitioner's due process rights were not violated by the trial court.

The petitioner contends that the trial judge's ruling allowing the admission of the recorded recollection denied its due process rights. This argument is without basis. To invoke this Court's jurisdiction on the basis of a deprivation of constitutional right, petitioner must show that it was deprived of a liberty or property interest by virtue of some state action. Petitioner has been deprived of neither by the trial court's ruling. The cases cited by petitioner do not support its claims.

In *Societe Internationale, Etc. v. Rogers*, 357 U.S. 197 (1958), the interest involved was the plaintiff's right to bring its action before the court for hearing. The state action involved was the power of the court under Fed. R. Civ. P. 37(b) to dismiss the plaintiff's action for failure to comply with a pre-trial discovery order. This Court held that where such a failure is due to inability and not to bad faith, the power of the court should not be used to deprive a party of its right to be heard. Withholding its power to dismiss the action was particularly appropriate in the context of the suit, this Court held, where the federal government had seized, without notice, certain personal property of plaintiff.

No such seizure or deprivation of process occurred in this case. The trial court simply overruled petitioner's objection to the admission of certain evidence. Adverse evidentiary rulings, in private party civil cases, are not the usual stuff of due process violations, and this case presents no exception.

Schlagenhauf v. Holder, 379 U.S. 104 (1964), cited by petitioner, does not involve the due process clause and presents no basis for this Court to review the Eleventh Circuit's decision. Petitioner believes *Schlagenhauf* provides that granting a writ of certiorari is proper where the construction or application of a

Federal Rule of Evidence is contested. In *Schlagenhauf*, this Court granted a writ of certiorari "to review undecided questions concerning the validity and construction of Fed. R. Civ. Pro. 35." *Id.* at 109. But there are no undecided questions regarding the construction of Rule 803(5) raised in this case. What is contested is the *application* of the rule. But the contested application of a Rule of Evidence should not be grounds to involve this Court's jurisdiction. And certainly, this is not the result *Schlagenhauf* provides.

The balance of cases cited by petitioner in this section are opinions on criminal appeals. Criminal prosecutions clearly invoke due process concerns as the state is acting to deprive the defendants of their property and liberty interests. But no action of the state acting to deprive the petitioner of a property interest occurred in this case. These criminal cases are inappropriately cited. The argument is misplaced and does not properly call for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

Following are the pertinent excerpts from the trial transcript of the examination of witness Judy Garrabrant.

[Questions by Respondent's Counsel.]

Q. Let me show you a document which has not been marked for identification and ask you to examine it.

* * *

Q. Have you read that document? A. Yes, sir.

Q. What is that document entitled?

* * *

A. Oh, title? It's an affidavit.

* * *

Q. Does that document bear a signature? A. Yes, sir, it does.

Q. Whose signature? A. It has mine and the witness.

Q. Are you able to identify that as your signature? A. Yes, sir.

Q. What is the date on that document? A. The 18th of September, 1987.

Appendix A

Q. Is that a true and accurate copy of an affidavit signed by you on that date? A. Yes, sir.

Q. Now, do you presently today, Ms. Garrabrant, have sufficient recollection to enable you to testify fully and accurately about the matters set forth in that affidavit? A. No, I do not.

Q. However, at the time you swore the affidavit, were the matters set forth therein fresh in your memory at this time? A. Yes, sir.

Q. And at the time you swore the affidavit, did you have knowledge and recollection of the matters set forth in that affidavit? A. Yes I did.

Q. Since you stated that you signed that affidavit under oath, I assume it correctly reflects your knowledge at that time; is that a fair statement? A. Yes, sir, uh-huh.

[T 34-36].

Q. For clarification, Ma'am, do you presently recall that when you signed this affidavit, it was true? A. At the time I signed the affidavit, yes, I'm – I wouldn't have signed it if it wasn't true.

[T 42].

Appendix A

[Questions by petitioner's counsel]

Q. Do you recall the circumstances under which you signed that affidavit? A. Yes, I do.

[T 36].

Q. My question was that when you say you recall today that it was true then, is that because it was more recent in time? A. Right. It was fresher in my mind at that time, yes sir.

Q. Than today? A. Than today.

[T 43].

[Questions by the Court]

THE COURT: I believe you are telling us that you would not have signed it under oath if it were not true?

THE WITNESS: Yes, sir.

THE COURT: But you really have no recollection of the factual matters that may be contained in that affidavit?

THE WITNESS: Not at the present time.

THE COURT: And you don't remember whether you remembered it at the time you

signed it?

THE WITNESS: I don't think I would have signed it if I didn't remember.

THE COURT: Well is that because of habit, your custom of not to sign anything that is not factual if it's under oath?

THE WITNESS: Yes, sir.

[T. 40-41]